APPENDIX

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEAL
TENTH CIRCUIT

No. 80-1741

JEWEL BURRUS,
Plaintiff-Appellant,

v.

UNITED TELEPHONE COMPANY OF KANSAS, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 76-231-C2)

(Filed July 22, 1982)

Submitted on the briefs:

Richard H. Anton, Kansas City, Missouri, for Plaintiff-Appellant.

J. Richard Smith, Overland Park, Kansas; and Arlyn D. Haxton and John A. Verling, III, of Dietrich, Davis, Dicus, Rowlands & Schmitt, Kansas City, Missouri, for Defendant-Appellee.

Before SETH, Chief Judge, LOGAN, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

Jewel Burrus brought this sex discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, against United Telephone Company of Kansas, Inc. (UTC). Burrus alleges that UTC engaged in unlawful employment discrimination by failing to promote her because of her sex,[1] and by retaliating against her after she filed charges of discrimination.[2] We affirm the trial court's holding that UTC did not violate Title VII.

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1. The relevant statute, 42 U.S.C. § 2000e-2(a), provides in pertinent part:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."

2. The relevant statute, 42 U.S.C. § 2000e-3, provides in pertinent part:

> "(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

I.

Background of Case

The facts relevant to Burrus' Title VII action are as follows. Burrus is an a[illegible]ntant. She worked for the American Telephone & Telegraph Company (AT&T) between 1948 and 1968. From June 1968 until February 1970, she was employed by United Systems Services, Incorporated (USS). Thereafter, Burrus worked for defendant UTC until she was terminated in 1976. Both USS and UTC are wholly owned subsidiaries of United Telecommunications, Incorporated.

While employed by these companies, Burrus held various positions and pursued her education. During her last five years of employment with AT&T, she served as an Accounting supervisor. Neither she nor anyone she supervised at AT&T had an accounting degree. Burrus' job title throughout her employment with defendant UTC was "accountant," although she did not obtain her Bachelor of Science accounting degree until 1972.

UTC never promoted Burrus. UTC did, however, promote some of her male and female contemporaries to supervisory positions. Burrus claims that she was as well qualified as the promoted males; that she had made known her desire for promotion; and that UTC not only refused to promote her, but closed out available positions by appointing males to them.

Because of the alleged discriminatory practices of UTC, Burrus filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) and the Kansas Commission on Civil Rights. Her retaliation claim is based on an allegation that after she filed her charge, UTC further restricted her growth opportunities and generally conspired to drive her from the firm.

Both the EEOC and the Kansas Commission found no probable cause to believe Burrus' charges were true. Burrus subsequently filed this lawsuit in federal court. After a bench trial, the court held against Burrus on all her claims. Burrus argues on appeal that the district court erred: (1) by holding she was not discriminated against because of her sex; (2) by finding UTC did not unlawfully retaliate against her after she filed discrimination charges; and (3) by finding Burrus' statistical study to be without probative value.

II.

Sex Discrimination

In holding that Burrus was not the victim of unlawful sex discrimination, the trial court found:

> "The evidence in this case indicates that plaintiff may have been technically as well qualified as some of her male counterparts who were promoted. It also shows that she was certainly not as technically qualified as two of the males about whom she has complained. More importantly, the evidence suggests that plaintiff was indeed ill-qualified for promotion to a supervisory position, in that she lacked the interpersonal skills necessary for such an advancement. Plaintiff remained unpromoted because she was uncommunicative and unable to work effectively with others."

Rec., Vol. I, at 27. The court concluded that "[s]ince . . . plaintiff was not qualified for promotion by reason of her general lack of interpersonal skills, it follows . . . that the court must find as a matter of law that plaintiff has not made out a *prima facie* claim of discrimination in this case." *Id.* at 29.

Burrus argues that the district court erred in its findings that Burrus was not qualified for promotion and thus did not make out a prima facie case of promotion discrimination. She also argues that the criteria used for promotion were too subjective.

A Title VII disparate treatment action for promotion discrimination proceeds in three stages. The plaintiff first has the burden of establishing a prima facie case of employment discrimination under the standards set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). If the prima facie case is established, the defendant must articulate a reason, using admissible evidence, to explain why "the plaintiff was rejected, or someone else preferred, for a legitimate, nondiscriminatory reason." *Texas Department of Community Affairs*, 450 U.S. at 254. If such a reason is offered, in order to prevail the plaintiff must demonstrate that the defendant's articulated reason is a mere pretext for unlawful discrimination. *Id.* at 256. Throughout these stages, the overall burden of persuasion remains with the plaintiff. *Id.*

In this case, the trial court concluded that Burrus had failed to establish a prima facie case because she was not "qualified for promotion by reason of her general lack of interpersonal skills," rec., vol. I, at 29, even though she "may have been technically as well qualified as some of her male counterparts who were promoted." *Id.* at 27.

The Ninth Circuit has recently considered at what stage subjective qualifications are properly addressed in the *McDonnell Douglas* three-step analysis. In *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1344 (9th Cir. 1981), the court concluded:

> "[O]*bjective job qualifications are best treated at step one* and *subjective criteria*, along with any supporting evidence, *are best treated at the later stages of the process*. To do otherwise would in many instances collapse the three step analysis into a single initial step at which all issues would be resolved. This would defeat the purpose underlying the McDonnell Douglas process. See Sweeny, 439 U.S. at 24 n.1, 99 S. Ct. at 296 n.1."

Id. (emphasis added). We agree with this analysis. Although subjective evaluations play a legitimate part in an employer's determination whether an employee has the ability to supervise others, *Bauer v. Bailar*, 647 F.2d 1037, 1046 (10th Cir. 1981), it is also apparent that "subjective decision making provides an opportunity for unlawful discrimination." *Id.*; *Thornton v. Coffey*, 618 F.2d 686, 691 (10th Cir. 1980); *Abrams v. Johnson*, 534 F.2d 1226, 1231 (6th Cir. 1976). In fact, the rejection of an otherwise qualified individual on the basis of subjective considerations entitles the plaintiff "to the benefit of an inference of discrimination, which inference requires the defendants to come forward and articulate legitimate reasons for her non-selection." *Bauer*, 647 F.2d at 1045; *see Texas Department of Community Affairs*, 450 U.S. at 253.

If a plaintiff's failure to establish that she met the employer's subjective criteria could defeat her prima facie case, the court would then not be required to consider evidence of pretext. Thus the use of subjective criteria could go unchallenged. This result is clearly at odds with the mandate of *McDonnell Douglas* that a plaintiff be afforded a full and fair opportunity to demonstrate that the stated reason for rejection was in fact pretext. 411 U.S. at 804; *see also Texas Department of Community Affairs*, 450 U.S. at 255-56. Although the trial court in this

case found that Burrus was objecti ely qualified for the position, it improperly concluded on the basis of subjective criteria that Burrus failed to establish a prima facie case.

The trial court went on to hold, however, that even assuming the existence of a prima facie case based on Burrus' objective qualifications, the subjective evaluation that she lacked the required ability to get along with others was a legitimate business reason amply supported by the evidence and not rebutted by any showing of pretext. We must uphold these findings of fact unless they are clearly erroneous. *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969); *Williams v. Colorado Springs, Colo. School District #11*, 641 F.2d 835, 843 (1981). Trial court findings are not clearly erroneous unless we are definitely and firmly convinced, after reviewing the record as a whole, that a mistake has been made. *id.*

Where applicants for a position have objective qualifications that are equal, it is within the employer's discretion to choose among them so long as the decision is not based on unlawful criteria. *Texas Department of Community Affairs*, 450 U.S. at 259. We have reviewed the entire record in this case and we do not have a definite and firm conviction that the trial court was mistaken in finding no discrimination. There is evidence that two of the promoted males were more qualified than Burrus because of education, experience, or both. The other males were at least as well qualified as Burrus. Several employees of UTC, including Burrus' direct supervisor and a female employee, testified that Burrus did not get along or communicate well with other UTC employees. Adequate evidence supports the trial court's ultimate conclusion that Burrus was not discriminated against on the basis of her sex.

III.

Retaliation

Burrus contends the district court erred in finding that UTC did not retaliate against her because she filed charges of sex discrimination. Burrus claims that pay and promotional opportunities were denied her, and that she ultimately was terminated in retaliation for her charges.

The general approach to Title VII suits set out in *McDonnell Douglas* and *Texas Department of Community Affairs* is also applicable to retaliation claims. *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 46 (2d Cir. 1980); *Womack v. Munson*, 619 F.2d 1292. 1296 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981); *Mitchell v. Visser*, 529 F. Supp. 1034, 1044 (D. Kan. 1981). A plaintiff must first establish a prima facie case of retaliation by showing that: (1) she engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding; (2) she was disadvantaged by an action of her employer subsequent to or contemporaneously with such opposition or participation; and (3) there is a causal connection between the protected activity and the adverse employment action. *Smalley v. City of Eatonville*, 640 F.2d 765, 769 (5th Cir. 1981); *Gunther v. County of Washington*, 623 F.2d 1303, 1314 (9th Cir. 1979) *aff'd on other grounds*, 452 U.S. 161 (1981); *Grant*, 622 F.2d at 46; *Womack*, 619 F.2d at 1296. The causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. *See Grant*, 622 F.2d at 46; *Womack*, 619 F.2d at 1296 & n.6.

If a prima facie case is established, then the burden of production shifts to the defendant to articulate a legiti-

mate, nondiscriminatory reason for the adverse action. *Womack*, 619 F.2d at 1296. The defendant need not prove the "absence of retaliatory motive, but only produce evidence that would dispel the inference of retaliation by establishing the existence of a legitimate reason." *Id.*; *see Texas Department of Community Affairs*, 450 U.S. 254-55; *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577-78 (1978). If evidence of a legitimate reason is produced, the plaintiff may still prevail if she demonstrates the articulated reason was a mere pretext for discrimination. The overall burden of persuasion remains on the plaintiff. *Texas Department of Community Affairs*, 450 U.S. at 255-60.

Here, plaintiff was terminated in January 1976, almost three years after she filed her initial charge of gender discrimination. The record supports the conclusion that Burrus' whole department was justifiably terminated, male and female, because it was duplicating work done elsewhere. Given the length of time between the filing of charges and the termination, we agree with the trial court that Burrus failed to establish a prima facie case of retaliation based on her termination.

The record also amply supports the trial court conclusion that even if Burrus made out a prima facie case of retaliation based on unfavorable job evaluations and lack of pay increases prior to termination, UTC offered legitimate reasons for Burrus' restricted opportunities which she did not demonstrate were a mere pretext for discrimination. *See e.g., Gunther*, 623 F.2d at 1314; *Miller v. Williams*, 590 F.2d 317, 320 (9th Cir. 1979). Without detailing all the evidence, we note testimony regarding Burrus' continuing attitudinal problems and her inability to work with fellow employees. Thus, we must uphold the trial court's conclusion that UTC did not unlawfully retaliate against Burrus.

IV.

Statistical Study

Burrus also argues that the district court erred in holding that Burrus' statistical evidence was without probative value. However, adequate evidence in the record supports the trial court's conclusion that the data base of the study was defective because of its small size and other factual inaccuracies.

The judgment of the district court is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
CIVIL ACTION

NO. 76-231-C2

JEWEL D. BURRUS,
Plaintiff,

vs.

UNITED TELEPHONE COMPANY
OF KANSAS, INC.,
Defendant.

(Filed June 19, 1980)

JOURNAL ENTRY OF JUDGMENT

This action came on to be tried before the Court, and the evidence adduced by the parties and the arguments of counsel having been heard, and thereupon, upon consideration thereof, the Court having rendered and filed an Opinion and made and filed Findings of Fact and Conclusions of Law dated June 10, 1980, it is hereby

Ordered, Adjudged and Decreed that final judgment be entered herein in favor of the defendant and against plaintiff on the plaintiff's Complaint and that the same is hereby dismissed with costs to the defendant.

/s/ Dale E. Saffels
United States District Judge

Dated: Jun 19 1980

APPROVED AS TO FORM THIS 17 DAY OF JUNE, 1980.

/s/ John McKay
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
CIVIL ACTION

NO. 76-231-C2

JEWEL D. BURRUS,
Plaintiff,

vs.

UNITED TELEPHONE COMPANY
OF KANSAS, INC.,
Defendant.

(Filed June 10, 1980)

MEMORANDUM AND ORDER

Plaintiff filed this sex discrimination action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* The parties tried the case to the court between April 14 and April 17, 1980. The following are the court's findings of fact and conclusions of law with regard to that trial.

I. FINDINGS OF FACT

Plaintiff is a female accountant. Defendant employed her between February, 1970, and January, 1976. United Systems Services, Inc. employed plaintiff between June, 1968, and February, 1970. Defendant and United Systems Services, Inc. are wholly-owned subsidiaries of United Telecommunications, Inc., a holding company. During her tenure with defendant, plaintiff advanced from a Job Grade 9 to a Job Grade 12. Although she did not receive her accounting degree until 1972, plaintiff's job title with defendant throughout her employment was "accountant." Defendant did not promote plaintiff during the term of

her employment with defendant. Prior to her employment with United System Services, Inc., plaintiff worked for the American Telephone and Telegraph Company between 1948 and 1968. During the last five years of her time with A.T. & T., plaintiff served as an Accounting Supervisor. While with A.T. & T., however, plaintiff never had occasion to supervise anyone who possessed an accounting degree. As previously mentioned, plaintiff acquired her Bachelor of Science in Business Administration, with a major in Accounting, in 1972. While still in the employ of defendant, plaintiff took certain coursework toward a Master of Arts degree.

Plaintiff's cause of action is premised upon the allegations that defendant failed to promote plaintiff, and took certain retaliatory actions against plaintiff, due to the fact that defendant actively pursued a policy of sex discrimination in employment. Plaintiff was specifically disgruntled by the fact that certain of her male contemporaries were promoted to supervisory positions within the defendant company. Plaintiff complains that she was as well qualified as the males in question, that she had made known her desire for promotion, and that defendant not only refused to promote plaintiff, but also closed out the available positions by appointing males to them. But the evidence indicates, and the court so finds, that in all cases detailed by plaintiff, the males about whom plaintiff complains were at least as well qualified as plaintiff for the supervisory positions in question. In fact, the court finds that at least two of the males involved, Gary Hamilton and Ronald Sondergard, were more qualified than plaintiff for accounting supervision positions, by reason of either experience or education or a combination of the two.

In consequence of the allegedly discriminatory decisions of defendant in promoting certain males to supervisory positions, plaintiff filed a charge of sex discrimination in March, 1973 with the Equal Employment Opportunity Commission and the Kansas Commission on Civil Rights. Plaintiff claims that as a result of having filed the charge in question, defendant retaliated against plaintiff by, among other things, further restricting her growth opportunities and generally conspiring to drive her out of the firm. Defendant's failure to promote plaintiff, as well as its alleged retaliation against her for the EEOC-KCCR claim, form the basis of this action.

The court finds as a matter of fact that the ability to get along and communicate with one's peers, subordinates and superiors is a crucial consideration in the determination of whether a person is suitable for promotion to a supervisory position in nearly any business setting, and specifically in the context of plaintiff's employment with defendant. The court also finds that there is no evidence, either documentary or testimonial, which would tend to establish that plaintiff possesses this critical quality. Indeed, with the exception of plaintiff's testimony, all of the evidence in this case indicates either directly or indirectly that plaintiff is uncommunicative and generally lacking in interpersonal skills. The corroborative testimony on this issue comes not only from current employees of defendant who worked with plaintiff, but also from plaintiff's former supervisor, who is no longer employed by defendant, and has instituted his own litigation against defendant.

The evidence in this case indicates that plaintiff may have been technically as well qualified as some of her male counterparts who were promoted. It also shows that she was certainly not as technically qualified as two of

the males about whom she has complained. More importantly, the evidence suggests that plaintiff was indeed ill-qualified for promotion to a supervisory position, in that she lacked the interpersonal skills necessary for such an advancement. Plaintiff remained unpromoted because she was uncommunicative and unable to work effectively with others.

II. CONCLUSIONS OF LAW

Title VII actions proceed in three stages. The plaintiff first has the burden of making a *prima facie* case that the defendant has engaged in some discriminatory practice. The defendant is next permitted to show that the alleged discriminatory practices were undertaken for legitimate, non-discriminatory reasons. Finally, the plaintiff may rebut defendant's evidence with a showing that the non-discriminatory reasons put forth by defendant for its actions are in fact nothing more than a pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); and *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978).

A plaintiff may make out a *prima facie* claim of discrimination by showing:

> "... (i) that he belongs to a ... minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. ..." *McDonnell Douglas Corp. v. Green, supra*, at 802.

In this case, plaintiff has established that she had made plain to defendant her desire to advance. She has

also shown that she was not promoted, while her male contemporaries were successful in achieving higher levels in management. The critical question, then, is whether plaintiff was qualified for the positions for which she applied.

The case law makes it abundantly clear that a plaintiff fails to make a *prima facie* showing of discrimination if plaintiff does not establish his or her qualification for the job in question. *Johnson v. Fulton Sylphon Division*, 439 F.Supp. 658 (E.D. Tenn. 1977) [poor work record]; *Thompson v. McDonnell Douglas Corp.*, 552 F.2d 220 (8th Cir. 1977) [frequent absences]; *Lim v. Citizens Savings and Loan Assn.*, 430 F.Supp. 802 (N.D. Cal. 1976) [education and experience]; *United States v. University of Maryland*, 438 F.Supp. 742 (D.Md. 1977) [lack of experience]; and *Winfrey v. Metropolitan Utilities District*, 467 F.Supp. 56 (D.Neb. 1979) [errors on job]. More importantly, it has been consistently held that an inability to get along with one's associates in a work environment will support an employer's decision either not to promote or to discharge an employee. A *prima facie* case of discrimination is not made out when such elements are present in a case. *Stevens v. Junior College District of St. Louis*, 548 F.2d 779 (8th Cir. 1977); *Cedeck v. Hamilton Federal Savings and Loan Assn.*, 414 F.Supp. 495 (E.D.Mo. 1976); *Bradington v. International Business Machines Corp.*, 360 F.Supp. 845 (D.Md. 1973); *Lindsey v. Southwestern Bell Telephone Co.*, 546 F.2d 1123 (5th Cir. 1977); *Morales v. Dain, Kalman & Quail, Inc.*, 467 F.Supp. 1031 (D. Minn. 1979); *Mopkins v. St. Louis Die Casting Corp.*, 423 F.Supp. 132 (E.D.Mo. 1976), *aff'd.* 569 F.2d 454 (8th Cir. 1978); and *Naraine v. Western Electric Co., Inc.*, 507 F.2d 590 (8th Cir. 1974). Since the court has already found as a matter of fact that plaintiff was not qualified for promotion by reason of her general lack of interpersonal

skills, it follows from the above that the court must find as a matter of law that plaintiff has not made out a *prima facie* claim of discrimination in this case.

Even if the court were to assume *arguendo* that plaintiff had established a *prima facie* claim of discrimination in this matter, the evidence adduced by defendant on the subject of plaintiff's personality would constitute sufficient grounds for negating the inference of discriminatory conduct raised by plaintiff. In this connection, it should be noted that an employer may "articulate" a legitimate, non-discriminatory reason for its conduct toward an employee without having to actually prove the absence of discriminatory motive; that is, the employer may meet his burden by merely explaining what was done, as long as the actions complained of were undertaken for non-discriminatory reasons. *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978); and *Diggs v. Western Electric Co.*, 587 F.2d 1070 (10th Cir. 1978). It has been held that a subjective analysis of the personality characteristics of an employee may represent a legitimate and non-discriminatory reason for the failure of an employer to hire or promote an individual. *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325 (5th Cir. 1978); *Haire v. Calloway*, 572 F.2d 632 (8th Cir. 1978); and *Williams v. Yazoo Valley-Minter City Oil Mill, Inc.*, 469 F.Supp. 37 (N.D.Miss. 1978).

Some mention needs to be made of certain statistical evidence introduced by plaintiff. Plaintiff's counsel assembled certain data regarding the employees, male and female, who composed the accounting department in which plaintiff worked while in defendant's employ. The data generally covered the time period during which plaintiff worked for defendant. Plaintiff's statistical evidence is based on fifty-five cases, each "case" representing a particular individual who worked contemporaneously with

plaintiff in defendant's accounting department. Plaintiff submitted this data to a statistical expert, who analyzed the information with the aid of a computer. The conclusion reached by plaintiff's statistical expert was that differences in salary and authority as between male and female employees in defendant's accounting department during the period in question could only be explained by the presence of sexual bias on the part of defendant.

The court finds as a matter of law that plaintiff's statistical evidence is without probative value. The statistical evidence produced here has several weaknesses. First, it is based on a study of only fifty-five persons. The very size of the group studied detracts from the ultimate value of the exercise. In addition, plaintiff made no attempt to compare the employee group in question to the other employee groups existing in defendant's organization. Neither did plaintiff relate her statistical evidence to comparable evidence relevant to the Kansas City Metropolitan area as a whole. It is generally recognized that statistical evidence based on a "small universe" has very little probative value. *EEOC v. North Hills Passavant Hospital*, 466 F.Supp. 783 (W.D.Pa. 1979); *Mopkins v. St. Louis Die Casting Corp., supra; Ochoa v. Monsanto Company*, 335 F.Supp. 53 (S.D.Tex. 1971), *aff'd* 473 F.2d 318 (5th Cir. 1973); and *Friend v. Leidinger*, 446 F.Supp. 361 (E.D.Va. 1977), *aff'd* 588 F.2d 61 (4th Cir. 1978). Moreover, plaintiff's statistical evidence contains certain inaccuracies, such as the multiple inclusion of some individuals (under different names) and the inclusion of certain persons who were not members of the group in question. Where questions exist as to the accuracy of the elements which make up a statistical example, the probative value of the evidence is undermined. *United States v. University of Maryland, supra;* and *Williams v.*

New Orleans Steamship Assn., 466 F.Supp. 662 (E.D.La. 1979). Finally, since this is an action by an individual grievant, even if plaintiff's statistical evidence were found to have probative value, it would tell the court very little regarding defendant's reasons for not having promoted plaintiff. *Terrell v. Feldstein Co., Inc.*, 468 F.2d 910 (5th Cir. 1972); *Johnson v. Fulton Sylphon Division, supra;* and *Wilson v. Woodward Iron Co.*, 362 F.Supp. 886 (N.D. Ala. 1973).

In conclusion, the Court finds as a matter of law that:

(a) Plaintiff has not proven any facts to support her claim that defendant discriminated against her by refusing to promote her because of her sex, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*

(b) Plaintiff has not proven any facts to support her claim that defendant has discriminated against her because of her sex by harrassing her in her employment, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*

(c) Plaintiff has not proven any facts to support her claim that defendant retaliated against her because she filed charges of sexual discrimination against defendant, or because she had otherwise protested unlawful employment practices by defendant, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*

(d) Assuming without deciding that plaintiff had made a *prima facie* case of sex discrimination or retaliation against defendant, defendant articulated sufficient legitimate non-discriminatory reasons for its actions, thereby shifting the burden to plaintiff to show that the proffered justification was a pretext for discrimination. Plaintiff

failed to establish that the justification was a pretext for discrimination or that "but for" her sex or her having filed a charge of discrimination, she would have been more favorably treated by defendant.

Defendant is entitled to judgment in its favor against plaintiff on plaintiff's complaint, and plaintiff is not entitled to relief against defendant on the claims alleged in her complaint.

Defense counsel is directed to prepare an appropriate Journal Entry of Judgment. Said Journal Entry of Judgment is to be circulated to opposing counsel and presented to the court for signature.

IT IS SO ORDERED.

DATED: This 10th day of June, 1980, at Kansas City, Kansas.

/s/ Dale E. Saffels
Dale E. Saffels
United States District Judge